

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IAN PATRICK MEYER,)	CASE NO. C09-0926-MJP-MAT
)	
Plaintiff,)	
)	
v.)	ORDER ADOPTING THE
)	MAGISTRATE JUDGE’S REPORT
MICHAEL J. ASTRUE, Commissioner,)	AND RECOMMENDATION
Social Security Administration)	
)	
Defendant.)	
_____)	

This matter is before the Court on Plaintiff’s timely objections (Dkt. No. 19) to the Magistrate Judge’s Report and Recommendation (“R&R”) (Dkt. No. 18). After reviewing the objections, the R&R, relevant rulings, declarations, and exhibits, the Court ADOPTS the R&R, and AFFIRMS the administrative law judge’s (“ALJ”) decision denying benefits.

I. Background

Plaintiff appeals an adverse supplemental security income (“SSI”) and disability insurance benefits (“DIB”) determination by the Social Security Administration (“SSA”). The facts of this case are stated in the R&R. The Magistrate Judge recommends that the SSA’s determination be affirmed. (Dkt. No. 18 at 1.) Plaintiff filed objections to the R&R. (Dkt.

No. 19.) Defendant's response was untimely and stricken. (Dkt. No. 24.)

II. Plaintiff's Objections

Plaintiff offers six objections to the Magistrate Judge's recommendation to affirm the ALJ's ruling, none of which has merit. First, he argues that the ALJ failed to properly develop the record by incorrectly relying on medical expert Dr. Lindberg's opinion, and that the R&R engages in an improper post hoc rationalization of the ALJ's decision. Second, he claims that the ALJ did not properly consider treating physician Dr. Abbott's opinion. Third, he disagrees with the ALJ's rejection of treating physician Dr. Morris' opinion. Fourth, he objects to the ALJ's rejection of lay witness testimony from his mother and partner. Fifth, he claims that the ALJ failed to properly assess the medical equivalency of his disabilities to a listed impairment. Sixth, Plaintiff argues that the ALJ incorrectly relied on published guidelines, rather than a vocational expert, in assessing his employability and disability.

A. ALJ's Reliance on Dr. Lindberg's Expert Opinion

Plaintiff objects to the R&R's alleged "post hoc rationalization of the ALJ's decision" to make a determination without fully developing the record. (Dkt. No. 19 at 2.) He contends the ALJ failed to develop the record by relying on medical expert Dr. Lindberg's expert opinion, which he alleges was formed without review of the entire record. (Id.) However, the ALJ did not fail in this duty, and the R&R does not improperly engage in post hoc rationalization.

i. ALJ's Duty to Develop the Record

Plaintiff's assertion that the ALJ failed to develop the record is unfounded.

01 The Commissioner has the responsibility to “make every reasonable effort” to obtain
 02 the claimant’s “complete medical history” for at least the twelve month period preceding the
 03 month in which the application was filed. 20 C.F.R. §§ 404.1512(d) and 416.912(d). In this
 04 context, “complete medical history” means treatment records for the twelve months prior to the
 05 claim’s filing, or in the alternative, the twelve months preceding the month in which the
 06 claimant was last insured by DIB. 20 C.F.R. §§ 404.1512(d)(1), 416.912(d)(1) (2000).

07 The ALJ held the record open post-hearing for Plaintiff to submit more evidence. (See
 08 R. at 29.) The record does not indicate whether the ALJ had Dr. Lindberg review this
 09 additional evidence or ever had a duty to compel him to do so. Nonetheless, Plaintiff argues
 10 that the ALJ did not fully develop the record. (Dkt. No. 19 at 2-3.) The R&R correctly notes
 11 that although the ALJ had no duty to accept or review additional evidence, the ALJ permitted
 12 and considered it anyway. (Dkt. No. 18 at 7-8; R. at 29-30.) Though Plaintiff implies that Dr.
 13 Lindberg should have been compelled to review the evidence, Plaintiff never states why this
 14 was required.

15 There is no evidence that the ALJ failed to comply with her duty to develop the record.

16 **ii. The R&R’s Alleged Post Hoc Rationalization of the ALJ’s Decision**

17 Plaintiff also asserts that the R&R improperly engages in post hoc rationalization of the
 18 ALJ’s decision. (Dkt. No. 19 at 2-3.) This argument lacks merit.

19 In SSI/DIB cases, the claimant has the responsibility to prove that he is disabled, and
 20 bears the burden of bringing any evidence of disablement to the ALJ’s attention prior to
 21 decision. 20 C.F.R. §§ 404.1512(a),(c) and 416.912(a),(c). Once an administrative body has
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01 made a decision, post hoc appellate rationalization of that decision is prohibited. SEC v.
02 Chenery Corp., 332 U.S. 194, 196 (1947).

03 Plaintiff asserts that the additional medical evidence he supplied after the administrative
04 hearing was not inspected by Dr. Lindberg, yet the ALJ used Dr. Lindberg's opinion as the
05 main basis for the denial. Plaintiff argues that while the R&R cites 20 C.F.R. §§ 404.1512(a)
06 and (c), 416.912(a)(c) as a rationale for the ALJ's consideration, the ALJ herself never cited to
07 those regulations. Although the ALJ did not cite to the pertinent regulations, she took actions
08 consistent with them. By holding the record open after the hearing, commenting that she
09 "[didn't] know what the new records are going to show," and questioning whether the
10 additional evidence would require a new hearing, she was leaving the burden to Plaintiff to
11 show her why the additional evidence was important. (R. at 1272.) Since there was no
12 additional hearing, Plaintiff presumably failed to meet this burden. The R&R relies on the
13 same rationale for dismissal as set forth by the ALJ.

14 **B. ALJ's Evaluation of Dr. Abbott's Opinion**

15 Plaintiff argues that the ALJ failed to give the opinion of treating physician Dr. Travis
16 Abbott proper weight, and that the R&R erroneously dismisses this error as harmless. (Dkt.
17 No. 19 at 4-5.) These arguments are unpersuasive.

18 Determination of a claimant's residual functional capacity for work ("RFC") is the
19 province of the Commissioner, and by extension, the ALJ; other parties' analysis of a
20 claimant's RFC is not given special significance, even if the opinion originates from a treating
21 source. 20 C.F.R. §§ 404.1527(e)(1-3), 416.927(e)(1-3).

01 Dr. Abbott determined Plaintiff to be physically limited to work requiring light to
02 medium exertion, and that his mental health issues might further limit his employability. (R. at
03 561-62.) As the R&R notes, the ALJ incorrectly dismissed Dr. Abbott's opinion as originating
04 solely from a co-authoring nurse practitioner. (R. at 559-62; Dkt. No. 18 at 11.) However,
05 the R&R correctly concludes that this error was harmless because the opinion itself was Dr.
06 Abbott's assessment of Plaintiff's RFC, and not a medical opinion. (Dkt. No. 18 at 11-12.)
07 The R&R is also correct that even with the ALJ's erroneous treatment of Dr. Abbott's opinion,
08 she independently determined that Plaintiff was limited to sedentary work. (*Id.* at 12 (citing R.
09 at 31-32).) For both reasons, the ALJ's incorrect attribution of Dr. Abbott's opinion was
10 harmless error.

11 C. ALJ's Rejection of Dr. Morris' Opinion

12 Plaintiff objects to the rejection of the opinion of Dr. Kevin Morris, a psychologist that
13 examined him on April 12, 2006. (Dkt. No. 19 at 5-6.) This objection is groundless.

14 The ALJ rejected Dr. Morris' testimony because his opinion was based on Plaintiff's
15 report that his drug addiction was in sustained full remission, which the ALJ found to be not
16 credible. (R. at 37.) The R&R accepts the ALJ's rationale, citing several instances of
17 Plaintiff's continued drug use. (Dkt. No. 18 at 12.) Plaintiff complains that these cites of
18 drug use are all after April 12, 2006 and the ALJ did not rely on them in rejecting Dr. Morris'
19 opinion. (Dkt. No. 19 at 6.) Further, he claims that Plaintiff was "in a period of treatment and
20 remission" at the time that Dr. Morris wrote his evaluation.

21 The ALJ noted that Dr. Morris' opinion may have been written on Plaintiff's insistence,
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01 and could not be credited because it “depart[ed] substantially from the rest of the evidence of
02 record.” (R. at 37.) Though the Plaintiff is correct that the R&R only cites instances of
03 relapse after the April 12, 2006 date, the ALJ noted several instances of drug abuse and
04 noncompliance before and after that date to demonstrate Plaintiff’s ongoing drug use. (R. at
05 33.) The ALJ also cited evidence undermining Plaintiff’s credibility regarding his own drug
06 habits. Since it is undisputed that Dr. Morris’ opinion was based on Plaintiff’s own claim of
07 remission, Dr. Morris’ opinion was correctly rejected by the ALJ.

08 **D. ALJ’s Evaluation of Lay Witness Evidence**

09 Plaintiff argues that the ALJ incorrectly rejected the lay testimony from his mother and
10 partner describing his disabilities and functional problems. (Dkt. No. 19 at 7-8.) His
11 assertion is unsupported by the record.

12 Lay witness testimony is competent evidence if it pertains to a claimant’s impairments
13 or their effects. Van Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996). ALJs may
14 reject lay testimony only if they provide reasons germane to each witness. Lewis v. Apfel, 236
15 F.3d 503, 511 (9th Cir. 2001). Inconsistency with the record is a reason to reject the testimony.
16 Regennitter v. Comm’r of the Soc. Sec. Admin., 166 F.3d 1294, 1298 (9th Cir. 1999). ALJs
17 may also reject lay testimony if it contradicts objective medical evidence. Id. However, lay
18 testimony may not be rejected solely on the basis of familial relationship. Id.

19 Plaintiff’s argument that the ALJ rejected the lay testimony on the basis of familial
20 relationship lacks merit. Plaintiff agreed to pay both his mother and partner up to \$5,000 in
21 exchange for their testimony upon the approval of his disability claim. (R. at 1056.) The ALJ
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01 rejected both lay witness's testimony because of the evidence of their financial interest in
02 Plaintiff's claims, not because of familial affiliation. (R. at 34.) The ALJ also rejected the
03 testimony because it contradicted objective medical evidence. (R. at 34-35.) The R&R
04 correctly accepts both rationales; it concluded that the ALJ properly rejected the lay testimony
05 based on reasons germane to each witness. (Dkt. No. 18 at 13-14.)

06 Plaintiff's case differs from Howard v. Astrue, 2009 WL 385441, at *4 (C.D. Cal. Feb.
07 17, 2009) because, unlike in Howard, Plaintiff promised to pay the lay witnesses for their
08 testimony. The court in Howard held that merely "ha[ving] a financial interest in the outcome
09 of the case is . . . not a sufficient reason to reject the statements [of lay witnesses.]" Id.
10 Plaintiff attempts to analogize his situation with that of Howard. (Dkt. No. 19 at 7.)
11 However, this argument was correctly rejected by the R&R: "[t]his is not a situation where the
12 ALJ impermissibly presumed bias from the mere fact of a familial relationship." (Dkt. No. 18
13 at 14.) In Howard, the lay testimony was incorrectly rejected by the ALJ because the witness
14 was his live-in grandmother and caretaker, and, as a result, may have had a financial interest in
15 the outcome. By contrast, Plaintiff owed his mother and significant other a substantial sum of
16 money, and promised that he would pay them back if his claims were successful. (R. at 1056.)
17 They expected to be reimbursed; the witness in Howard did not. Howard is distinguishable,
18 and Plaintiff's claims to the contrary are without merit.

19 Plaintiff also argues that the ALJ rejected the evidence because the ALJ concluded that
20 the lay testimony "minimiz[ed] his drug use." (Dkt. No. 19 at 8.) Yet, Plaintiff relies on
21 testimony from his mother that his drug use was decreasing. (Id. (citing R. at 185, 196).) The
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01 ALJ did not simply reject the lay witness testimony because it discounted Plaintiff's drug
02 abuse. The ALJ's opinion contrasted the witness' testimony regarding Plaintiff's drug use
03 with the remainder of the record to demonstrate that it was materially inconsistent. (R. at
04 34-35.)

05 The R&R correctly affirms the ALJ's decision regarding lay witness evidence.

06 **E. The ALJ's Step Three Analysis**

07 Plaintiff does not disagree with the R&R's recommendation on the ALJ's step three
08 analysis; his objection to the R&R's assessment is difficult to comprehend.

09 At step three of the five-step SSI and DIB determination, ALJs must consider whether a
10 claimant's combination of impairments is medically equal to a listed requirement. Lester v.
11 Chater, 81 F.3d 821, 829 (9th Cir. 1995). The listed requirements for HIV infection require a
12 "finding of marked limitation of either activities of daily living, maintenance of social
13 functioning, or ability to complete tasks in a timely manner due to deficiencies in
14 concentration/persistence, or pace." 20 C.F.R. § 404 subpt. P app. 1 § 14.08(K)(1-3) (2000).

15 The R&R concludes that the ALJ failed to consider whether Plaintiff's combination of
16 impairments was medically equal to the listed requirements for HIV infection. (Dkt. No. 18 at
17 15-16.) However, it found the error harmless because the ALJ had properly determined that
18 none of Plaintiff's impairments were marked based on testimony from Dr. Lindberg. (Dkt.
19 No. 18 at 16.) Thus, regardless of the ALJ's error in assessing the listing requirements, the
20 ALJ established that the Plaintiff could not have met the listing requirements anyway. (Id.)

21 Plaintiff explains why the ALJ failed to properly consider Plaintiff's combination of
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01 impairments in light of the § 14.08(K) listing requirements. (Dkt. No. 19 at 8-10.) However,
02 the R&R already reaches the same conclusion. Plaintiff's only objection to the R&R's finding
03 of harmless error is the naked assertion that Dr. Lindberg "clearly . . . was referring to Plaintiff's
04 mental health issues, and not an analysis under § 14.08K (sic).” (Id. at 10.) Nothing else in
05 his objections or in the record supports this assertion. The R&R is correct in finding the ALJ's
06 error harmless.

07 **F. The ALJ's Step Four and Five Analysis**

08 Plaintiff argues that his HIV/AIDS-related physical limitations were severe enough to
09 have been considered as part of his RFC at step four of the disability determination, and that its
10 failure to be included in the step four analysis affected the ALJ's step five analysis. This
11 argument is unpersuasive.

12 Step five requires the Commissioner and ALJ to show that the claimant can perform
13 other jobs existing in the national economy. Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir.
14 2001). The showing can be made through the testimony of a vocational expert or by reference
15 to the Medical Vocational Guidelines, 20 C.F.R. § 404 subpt. P app. 2 (“Grid”). These
16 guidelines may be used only when they “completely and accurately represent the claimant's
17 limitations.” Tackett v. Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999); Reddick v. Chater, 157
18 F.3d 715, 725, 729 (9th Cir. 1998). Otherwise, a vocational expert must be used. Reddick,
19 157 F.3d at 729. Since the Grid does not consider non-exertional limitations, the ALJ has the
20 burden to determine whether the claimant's non-exertional impairments are severe enough to
21 preclude their use. Tackett, 180 F.3d at 1102; Reddick, 157 F.3d at 729. Only significant and
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01 sufficiently severe non-exertional limitations are enough to preclude the use of the Grid;
02 depression and anxiety are not enough. Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir.
03 2007).

04 The R&R correctly upholds the ALJ's determination that Plaintiff's RFC allowed him
05 to perform the full range of sedentary work. In spite of Plaintiff's contrary argument in his
06 opening brief to the magistrate judge, the ALJ properly used the Grid to find him not disabled
07 because his depression and anxiety were insufficient to warrant the use of a vocational expert.

08 However, in his objection to the R&R, Plaintiff asserts that the ALJ also failed to
09 include his HIV/AIDS-related limitations, such as fatigue and diarrhea. This argument did not
10 appear in either his opening brief or his reply brief, and he provides no factual support for the
11 claim. The record shows that the ALJ considered Plaintiff's HIV/AIDS-related non-exertional
12 limitations in determining Plaintiff's RFC and found them to be insufficient to preclude the
13 application of the Grid. The ALJ found that Plaintiff's "allegations regarding his capability to
14 perform activities of daily living and work-related activities are out of proportion to any
15 physical findings and without clinical or laboratory findings." (R. at 33.) This includes his
16 allegations of HIV/AIDS-related limitations, including fatigue. (R. at 38.)

17 Plaintiff does not support his claim that the ALJ failed to consider his
18 HIV/AIDS-related impediments during her RFC determination. The R&R's correctly accepts
19 the ALJ's step four and five analysis.

20 **III. Conclusion**

21 Plaintiff's objections to the R&R fail to show any critical flaws. The Court ADOPTS
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01 the R&R and AFFIRMS the ALJ's decision.

02 The Clerk is ordered to send copies of this Order to all counsel and to the Magistrate
03 Judge.

04 DATED this 12th day of August, 2010.

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07 Marsha J. Pechman
08 United States District Judge
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